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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 468.

ROBERT M. LEACH, Executor,
Plaintiff, Defendant in Error, Petitioner,

v.

MALCOLM E. NICHOLS, Former Collector of Internal Revenue,
Defendant, Plaintiff in Error, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER IN REPLY.

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SUPREME COURT OF THE UNITED STATES.

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ROBERT M. LEACH, EXECUTOR,
PLAINTIFF, DEFENDANT IN ERROR, PETITIONER,
v.
MALCOLM E. NICHOLS, FORMER COLLECTOR OF INTERNAL REVENUE,
DEFENDANT, PLAINTIFF IN ERROR, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER IN REPLY.

STATEMENT.

Pursuant to leave granted by the Court, the petitioner in the above-entitled case respectfully submits the following in reply to the "Brief for the Respondent in Opposition" to the allowance of the petition for certiorari filed herein on October 19, 1931.

ARGUMENT.

I.

THE RESPONDENT'S QUESTION IN REGARD TO THE CLAIM FOR REFUND IS NOT PROPERLY RAISED BY WAY OF OPPOSITION TO THE ALLOWANCE OF THE PETITION FOR CERTIORARI.

On page 2 of the brief in opposition, the respondent contends "that the sole question which need be considered by the Honorable Court, is the following":

"Whether a District Court may consider a ground for

refund of federal estate taxes imposed under the Revenue Act of 1916 when the amended declaration upon which the plaintiff went to trial in that court made no averment that any claim for refund had been filed setting forth that ground, and, as a matter of fact, no such ground was asserted in any claim for refund until after the amended declaration was filed, and more than seven years after the payment of tax, when the taxpayer filed with the Collector what he designated an 'amendment to claim for refund'."

As to this contention of the respondent, your petitioner respectfully submits:

First: This is a petition to review a decision of the Circuit Court of Appeals for the First Circuit. It is not a petition to review a decision of the District Court. The mere fact that the respondent bases his objection upon the proceedings in the District Court shows on its face that the Circuit Court of Appeals reversed the decision of the District Court on a different ground from that upon which the District Court rendered its decision.

In the District Court, the respondent admitted, in open court, that "the Massachusetts tax was a proper deduction" (Rec. p. 177) and, as pointed out in the opinion of the District Court (Rec. p. 151), there sought "to defeat a recovery of this illegally exacted tax by urging:

(1) that the Court was without jurisdiction to entertain the suit . . ." and,

(2) that no claim for refund upon the grounds now relied upon was filed within four years from the date of payment of the (Federal estate) tax."

The District Court (Rec. pp. 147–157) held (1) that the Court did have jurisdiction, and (2) that the petitioner had sufficiently complied with the statute in regard to claims for refund (R. S. Secs. 3226 and 3228; 43 Stat. c. 234, pp. 342–343).

The Circuit Court of Appeals failed to consider either of the two questions considered and decided by the District Court, and in its opinion (Rec. p. 167) said it was "unnecessary" to determine the question in regard to the claim for refund as "the District Court erred in holding that the Massachusetts tax was deductible".

The petitioner respectfully submits that this *admitted variance* between the questions decided by the District Court and that decided by the Circuit Court of Appeals is one of the strongest and most substantial reasons why this Court should grant the petition for certiorari.

Second: Furthermore, since the Circuit Court of Appeals did not decide any of the questions in regard (1) to the petitioner's amended declaration, (2) or to the "amendment" to the original claim (Rec. p. 133–145), *which was filed while the suit was still pending for decision in the District Court*, your petitioner respectfully contends that the respondent should not be permitted to raise any such questions by way of opposition to the allowance of the petition for certiorari.

Third: Even if this case were before this Court for review on its merits, your petitioner respectfully submits that the question presented by the respondent, in regard to the sufficiency of the claim for refund, would be improperly raised and that, upon the authority of the decisions of this Court, the respondent would be limited to such questions and such issues as were decided by the Circuit Court of Appeals, and precluded from injecting into the case such questions as were not considered or decided by that Court. On this point decisions of this Court and other courts are too numerous to mention, among them are the following:

San Juan Light Tr. Co. v. *Requena*, 224 U. S. 89;
Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228;
United States v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9.

In the case of *San Juan Light & Tr. Co.* v. *Requena, supra*, Mr. Justice Van Devanter said:

> "Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

In the case of *Tucker* v. *Alexander, supra*, Mr. Justice Stone said:

> "In our view of the case the question considered by

the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913."

In the case of *United States* v. *Mitchell, supra*, Mr. Justice Butler said:

> "It is not to be thought that a question not raised by counsel or discussed in the opinion of the Court has been decided merely because it existed in the record and might have been raised and considered. *Webster* v. *Fall*, 45 S. Ct. 148, 266 U. S. 507, 511, 69 L. Ed. 411."

Your petitioner respectfully submits, therefore, that the question in regard to the claim for refund is not a proper ground for opposition to the allowance of the petition for certiorari.

II.

AS A MATTER OF FACT AND OF LAW THE PETITIONER FULLY COMPLIED WITH THE STATUTE AND THE REGULATIONS IN REGARD TO THE FILING OF PROPER CLAIM FOR REFUND.

While the petitioner contends that the respondent is precluded from injecting into the case all questions in regard to the filing of claim for refund, since the Circuit Court of Appeals did not decide that question, nevertheless it seems necessary to state that the petitioner strongly contends that the District Court did not err in holding that the statute and regulations in regard to the filing of claim for refund were fully complied with, both in fact and in law. A full recital of the facts on this question seems to be entirely unnecessary.

In sustaining the petitioner's contentions as to the sufficiency of the plaintiff's original claim for refund and the amendment thereto the District Court ruled and commented (Rec. pp. 154–155) as follows:

> "In the case at bar, the amount of the refund claimed in the first claim filed was the amount legally refundable,

and the amendment only operated to submit to the Commissioner formally what had already been informally presented at hearings on the re-opened original claim, namely, additional grounds for claiming a return of the amount legally refundable. There was evidence tending to show that it had been the policy of the Commissioner, in dealing with estates of deceased persons, to accept claims in more or less general terms and permit specifications to come later. It has been urged, and I think appropriately, that in a matter involving an estate tax, it would be peculiarly compatible with justice to give effect to such an amendment inasmuch as the statute lays upon the Commissioner the positive duty of assessing the correct tax and refunding any excess. To hold that a late amendment to a claim filed on time answers the statute, does not defeat the declared purpose of the legislation if all the facts are presented to the Commissioner so that he may pass upon the claims before final determination of the tax liability, and before suit is brought to recover any tax illegally collected."

The petitioner submits that the above comments of the District Court are sound both in law and in fact. The facts of the case show clearly that the Commissioner of Internal Revenue was not misled or deceived by reason of the fact that the *original claim for refund* (Plaintiffs' Exhibit 9; Rec. pp. 111–119) did not specify the deduction of the Massachusetts tax.

Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228.

As to the amendment to the claim for refund (Plaintiff's Exhibit 21; Rec. pp. 133–144), the petitioner contends that in this case such amendment was entirely proper. The original claim for refund was valid in every respect. The suit thereon was brought within the period of limitations. The original declaration alleged that such claim had been filed. The petitioner further contends that the amendment must have complied with the statute and regulations because the Commissioner of Internal Revenue, as a matter of fact, actually allowed one of the items which was asserted for the first time in the amendment to the claim. Of course he would not have allowed even this item if

the suit had not been pending, thus keeping open the question of the final determination of the tax. If the amendment to the claim, under these circumstances, was valid as to one item, it seems reasonable to assume that it should be regarded as valid as to any other item which was proper and legal.

The petitioner further contends that such an amendment is proper because under the rules of the Court a party to a suit is allowed to amend his declaration or any other pleading at any time before final judgment. The ruling and order of the District Court allowing the petitioner's amendment in the instant case is clearly sustained by *Paragraph 777, Title 28, of the Judicial Code*, which provides as follows:

> "777. DEFECTS OF FORM: AMENDMENTS.—No summons, writ declaration, return, process, judgment, or other proceedings in civil causes, in any Court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specifically sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe. (R. S. Paragraph 954)."

Even if all of the "reasons" were not fully stated in the original claim for refund and in the original declaration, the cause of action remained unchanged and the petitioner contends that under the foregoing provisions he was clearly within his right in amending his original claim for refund showing further reasons why the *same tax* should be refunded, just as he was within his rights in appealing to the District Court to be allowed to amend his declaration. If this is not true the inevitable result is that the Commissioner of Internal Revenue can, by his regulation, completely nullify and set aside the rules of the Federal

Court and deprive taxpayers of the full benefit of the foregoing provision of the Judicial Code, in so far as amendments in actions at law are concerned.

Seaboard Air Line Railway v. *Renn*, 241 U. S. 290;
Texas & P. Ry. Co. v. *Cox*, 145 U. S. 593, 603;
Hutchinson v. *Otis Wilcox & Co.*, 190 U. S. 552.

In the case of *Seaboard Air Line Railway* v. *Renn*, *supra*, Mr. Justice Van Devanter laid down the following rule in regard to amendments:

> "If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. . . . In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action, and related back to the commencement of the suit which was before the limitation had expired."

In the case at bar the amendment to the claim for refund as well as to the amendment to the declaration which was allowed by the District Court merely "expanded or amplified what was alleged in support of the cause of the action already asserted". The amendment to the claim for refund merely conformed to the amendment to the pleadings.

There is no statute, published regulation or reported case which prohibits the filing of an amendment to a valid and timely claim for refund of Federal estate taxes if a suit has been brought upon such claim within five years from the date the tax was paid and the final determination of the tax is held in abeyance pending the decision of the Court. If, therefore, the sufficiency of the claim for refund and the amendment thereto which were filed in the instant case have been, or may be, properly raised by the respondent, your petitioner respect-

fully submits that the real questions presented for the decision of this Court are as follows:

1. Was the broad and comprehensive language contained in the plaintiff's original claim for refund sufficient compliance with the statute, by reason of the fact that in the case of the estate tax the statute expressly imposes upon the Commissioner the duty, in the first instance, of determining the proper and legal amount of the tax and the claim for refund requested "such further amount as is legally refundable"?

2. Did the filing of a valid and timely claim for refund of a portion of the estate tax and the bringing of the suit thereon within five years from the date such tax was paid, *suspend* the running of the statute so that the plaintiff might rightfully amend his claim for refund to conform to the amended declaration as allowed by the District Court, in accordance with the rules of procedure of the Court.

Your petitioner respectfully submits, therefore, that the petition for certiorari in the instant case should not be denied because of the objection advanced by the respondent in regard to the matter of the claim for refund.

III.

THE CASE AT BAR IS CLEARLY DISTINGUISHABLE FROM THE CASE OF UNITED STATES v. FELT & TARRANT MANUFACTURING COMPANY, 283 U.S. 269.

On page 8 of the brief in opposition, the respondent states as follows:

> "Under the decision of this Court in *United States* v. *Felt & Tarrant Mfg. Company*, 283 U. S. 269, it is plain that the petitioner is barred from recovering the tax he seeks to recover."

As to the *Felt & Tarrant Mfg. Company* case, the petitioner respectfully submits that that case is clearly distinguishable from the case at bar in the following respects:

(1) In that case the taxes involved were income taxes and the law did not impose upon the Commissioner of Internal Revenue the positive duty of determining and

establishing the true and legal amount of the tax in the first instance, so that the claim for refund which merely stated that it was "filed to protect all possible legal rights of the taxpayer" was clearly insufficient to comply with the requirements of the statute and the regulations.

(2) In that case, at no time during the proceedings before the Bureau of Internal Revenue was the ground for refund which was asserted in the suit ever brought to the attention of the Commissioner of Internal Revenue, so that he might pass thereon.

(3) In that case the tax was paid on June 15, 1918, but the suit was not brought until February 14, 1927, which was more than five years as provided by the statute.

(4) In that case no amendment to the original claim for refund specifying any grounds was ever filed with the Commissioner of Internal Revenue either before or after the suit had been brought.

Of all the recent tax cases decided by this Court, we think the case of *United States* v. *Swift & Company*, 51 S. Ct. 202, 282 U. S. 468, is more nearly in point. In that case the taxpayer filed an original claim for refund and later filed an amendment thereto. Mr. Justice Roberts who delivered the opinion in the *Swift case* held that the original claim was sufficient and in regard to the "amendment", said:

> "The views herein expressed make it unnecessary to decide whether the later claim may properly be considered an amendment of the original claim for refund."

If the respondents' question in regard to the sufficiency of the claim for refund has been properly raised, it is respectfully submitted that this Court should not deny the petition for certiorari on that ground but should allow the petition and decide the unsettled question as to whether or not a valid and timely claim for refund upon which suit has been seasonably brought may be amended while the suit is still pending and before the final determination of the tax.

Because of the fact that in the case at bar the plaintiff filed an amendment to the claim for refund, to conform to the amended declaration, while the suit was still pending and

before final determination of the tax, it is respectfully submitted that the petitioner is not "barred from recovering the tax he seeks to recover" by the decision of this Court in the case of *United States* v. *Felt & Tarrant Mfg. Co., supra.*

CONCLUSION.

Your petitioner respectfully submits that the contentions of the respondent as set forth in the brief in opposition should not be sustained and that this Court should grant the petition for certiorari in the instant case for the following reasons:

(1) Because of the great *conflict* of the decisions of the Supreme Judicial Court of Massachusetts as to the "nature" and "incidence" of the tax imposed upon estates by General Laws of Massachusetts, Chapter 65.

(2) Because of the *conflict* of the decisions of the District Court of Massachusetts and the United States Court of Claims on the one hand and the Circuit Court of Appeals on the other, as to whether or not the tax imposed upon estates by General Laws of Massachusetts, Chapter 65, was a proper deduction under Section 203 of the Revenue Act of September 8, 1916, as amended.

(3) Because of the *variance* between the ground upon which the Circuit Court of Appeals reversed the decision of the District Court and the grounds upon which the decision of the District Court is based.

(4) Because, if the decision of the District Court is reviewable, this case presents the question as to the effect of an amendment to a proper claim for refund filed after the suit thereon has been brought, *a question which does not seem to have been definitely decided by this Court. United States* v. *Swift & Company, supra.*

Respectfully submitted,

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